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**Sentencing and public confidence in Australia: The dynamics and foci of small  
group deliberations**

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# **Sentencing and public confidence in Australia: The dynamics and foci of small group deliberations**

## **Abstract**

*This study is the first of its kind in Australia to use the deliberative small group methodology to explore participants' deeper, nuanced thoughts on specific criminal justice issues in order to gain insight into the underlying beliefs that influence people's opinions on sentencing. The use of small group discussions allows an analysis of the dynamics of people's interactions and the potential of these to elicit deeper, more thoughtful deliberation. Participants' comments around two policy areas – mandatory sentencing and the use of alternatives to imprisonment – were founded on concerns about the need for judges to tailor the sentence to fit the specific circumstances of each case. The methodology itself has shown that people may change their initial opinions on complex issues when given the opportunity to discuss and reflect on their beliefs.*

## **Introduction**

Those who design sentencing law and policy are increasingly concerned about the relationship between public perceptions of the courts and how the courts actually deal with offenders. In particular, the last decade or so has seen significant research into the apparent 'crisis of confidence' in the sentencing functions of courts, which seeks to understand and contextualise this deficit of confidence, in order to suggest strategies for addressing the problem (Gelb, 2011). The reasons for this concern on the part of policy-makers<sup>1</sup> are probably three-fold: (1) the political imperative that makes it necessary to be seen to reflect community values in law and policy; (2) as a reaction to a perception that there is an increasing divergence between public perceptions and court practice; and (3) poor levels of public confidence make it more difficult to enact evidence-based reforms (especially those which may be seen to be less punitive or more liberal).

This concern about public confidence appears to manifest in a number of conceptually connected ways. Recent years have seen renewed attempts by

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<sup>1</sup> Concerns for policy-makers are likely to be different from concerns held by criminal justice system practitioners, for whom lack of confidence causes concern due to the reliance of the system on the community to report crimes, help with investigations, appear as witnesses and serve as jurors. For practitioners, concerns about lack of public confidence thus revolve around the effective functioning of the system itself, rather than around the need to incorporate community views into the development of criminal justice policy.

governments in most Australian jurisdictions to limit or 'structure' the extent of (individual or collective) judicial discretion with respect to sentencing practice, via such mechanisms as sentencing advisory bodies and guideline judgments and, in the United States, increasingly prescriptive sentencing grids, and the emergence of overtly punitive sentencing reforms such as three-strikes legislation and mandatory minimum sentencing provisions (see, for example, Freiberg, 2010; Frost, 2010; Roberts, 2008; Wood, 2009). Not all 'reforms' of this nature, however, are viewed positively by commentators and participants in the criminal justice system (Mackenzie, 2003). Finally, sentencing issues, and especially the seemingly intractable problem of recidivism among offenders, have attracted intense and renewed interest from academics and justice professionals in recent years.

One problem directly attributable to increased legislative and judicial punitiveness is a dramatically increasing prison population across many jurisdictions. The current incarceration rate in Australia of 168 prisoners per 100,000 within the adult population represents an increase of 50% over the past twenty years (Australian Bureau of Statistics, 2013). While this increase seems dramatic (and ignores fluctuations on a shorter time scale), it stands in contrast to the United States, where the imprisonment rate, at 716 prisoners per 100,000 population by the end of 2011, is the highest in the world. The number of prisoners in the United States has also increased by about 50% in the last fifteen years (from about 1.5 million in 1995 to 2.2 million in 2010) (International Centre for Prison Studies, 2012). In fact, by 2011 the United States Supreme Court had become so concerned with the problems created by the warehousing of prisoners in California that it concluded that a court-mandated population limit was necessary to remedy the regular violation of prisoners' constitutional rights.<sup>2</sup> The court found that the inability of the State to provide adequate care for prisoners when numbers outstripped resources was a breach of the constitutional prohibition against cruel and unusual punishment. The inmate density problems created by mass incarceration are beginning to rear their head in Australia. For example, Grant (2013) has noted that over the last three years, shipping containers have been used in the prison sector as a way of managing burgeoning prison populations in some Australian jurisdictions.

While the problem of prison over-crowding is not unique to California (Drucker, 2011), it has been most pronounced and debated in that State. The costs of high

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<sup>2</sup> *Brown, Governor of California, Et Al. V. Plata Et Al.*

incarceration rates are 'epidemiological' in that they include not only the costs of building prisons, other capital works, salaries of prison and support staff and the custody and care of inmates but also huge collateral costs. Homelessness and unemployment among ex-prisoners in Australia has reached acute levels (Baldry, McDonnell, Maplestone, and Peeters, 2006) and are both strong predictors of recidivism.

Given the financial tipping point with which US jurisdictions have been confronted, and the dramatic swings in support for alternatives to prison between jurisdictions and administrations, it is worth considering if longitudinal stability in criminal justice policy in Australia is possible as a hedge against a similar fate here. The issue is whether it can be achieved without a radical stimulus such as the crippling costs of mass incarceration and in the face of what Bottoms (and subsequently many others) refer to as 'populist punitiveness': 'the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms, 1995, p. 40).

Despite the obvious practical risks of adopting a blindly punitive approach to sentencing policy, appealing to public fear of crime and desire for retribution can be seen as an easy way in which to win (and keep) elected office. Punitive approaches tends to focus on eroding judicial discretion, increasing penalties and incarcerating more offenders, for longer.

The dangers of allowing punitive populism to disproportionately influence sentencing law and policy are demonstrated most clearly in jurisdictions with significant prison overcrowding. Overly punitive policy is not just a threat to the human rights of offenders. Most prisoners are eventually released. Even in countries such as the United States where mandatory sentencing has led to extremely long prison terms, hundreds of thousands of prisoners are returned to their communities annually (Drucker, 2011). Overcrowding is related to higher rates of reoffending, as resources do not allow for effective treatment and rehabilitation programs (Salin and Simpson, 2013). Negative effects of incarceration – association with harder criminals, loss of pro-social relationships, loss of employment and loss of stable accommodation – take their toll on the rehabilitative potential of prisoners. Punitive sentencing policy may have the unintended consequence of indirectly making communities less, not more, safe.

In addition to its adverse effect on community safety, punitive policy that is based on perceptions of a punitive public is typically founded on the basis of false assumptions. A significant body of research establishes that people may answer punitively when asked to respond to an abstract question on whether sentences are 'too tough, about right or too lenient', but that their responses become far more balanced and nuanced when given more information about the case (Warner and Davis, 2012; Gelb, 2006). Indeed, when provided with more information and greater opportunity for deliberation, initial punitive responses become significantly ameliorated: people prefer punishments similar to those actually imposed by courts (Doob and Roberts, 1983; St Amand and Zamble, 2001).

Despite consistent findings on disparities between 'public opinion' based on top-of-the-head opinion polls and more nuanced 'public judgment' (Green, 2006) based on more sophisticated methodologies, political debate tends to be reflective of the former. Green concludes that elected officials are being presented with mounting incentives to exploit media-filtered, shallow assessments of public opinions about criminal justice issues. He, and others (Indermaur, 2008), argue that group-based deliberations on these issues would help foster a democratisation of policy formation by linking it to *informed* public opinion, rather than to 'exploited' uninformed or poorly informed opinion. Although we now have some idea as to what 'informed public opinion' looks like in the sense meant in the criminological literature (based on the deliberative polls conducted by earlier researchers such as Fishkin (1995), Hough and Park (2002) and Luskin and colleagues (2002)), there had been no significant attempt to trial deliberative approaches in relation to sentencing issues in Australia. The current study begins that process.

### **Deliberative groups and criminal justice policy**

The deliberative poll is the best known mechanism of eliciting informed public opinion on criminal justice issues. It's designer, Fishkin, in collaboration with an English television channel in Manchester in 1994 (Hough and Park, 2002; Luskin, Fishkin and Jowell, 2002). The event involved inviting 500 people to a two-day forum of debate and deliberation that involved engagement between lay citizens, politicians and experts. Following presentation of information about criminal justice issues by a series of experts, participants were asked to discuss and debate a number of topics. Participants were questioned both before and after the event in order to determine their attitudes on a range of criminal justice issues, so that responses could be compared and the effect of the deliberative process identified.

The primary conclusion of the research was that there were measurable effects on public attitudes of the opportunity to learn, discuss and deliberate, with participants providing less punitive and more informed responses after the event (Fishkin, 1995).

The deliberative process provides an opportunity to examine the underlying concerns and concepts around which the conversation clusters, illuminating for researchers some of the concerns that drive people's opinions.

Research on discussions within deliberative groups has shown that people's underlying beliefs about the criminal justice system are often incorrect, and significantly influence their opinions. For example, one common finding reported in the literature is that people believe that judges have more discretion to decide the sentence to impose, and its quantum, than is really the case (Lovegrove, 2007). But if such misconceptions are indeed present, how deeply are they entrenched in the public mind, where do they come from and what social or cultural values and beliefs are they linked to? These are intensely qualitative questions that cannot meaningfully be addressed by the use of surveys or other quantitative methods.

### **The current study: aim and method**

The current study is the first of its kind in Australia to use the deliberative group methodology to explore the beliefs and concerns of participants' which influence their opinions on crime and sentencing issues.. The deliberative method allows us to go beyond top-of-the-head measures to ask *why* respondents position themselves on one side or the other of a specific policy issue.

This should benefit both researchers and policy-makers in that an analysis of participant concerns which arise during detailed discussions of sentencing may provide a better perspective on what resonates with the public than the data gathered through simple opinion surveys. Policy which is based on informed and properly understood public opinion should be more readily accepted by that public, and therefore more resilient.

To contextualise the content and consequent analysis of the discussions within the deliberative groups, we sought to identify links between factors which the groups emphasised, and the more significant data on punitiveness from the initial national

telephone survey. This not only provides a framework for conceptualising the data from the group deliberations, but indicates directions for future research. We also compared the implications of this data with findings from other studies about factors which influence deliberative attitudes to sentencing.

This research is the culminating component of a larger, four phase study of public perceptions of sentencing in Australia. A brief summary of the research structure helps to put the current discussion into methodological and conceptual perspective. Phase 1 was a national CATI survey which measured 'top-of-the-head' opinions on crime and justice, with a focus on the dependent variables of confidence in the courts, punitiveness and acceptance of alternative to imprisonment. Subsequent phases looked for movement in the dependent variables (as indicators of more informed opinion), associated with increasing levels of intervention with participants. The Phase 2 survey provided participants with contextually relevant information (such as the costs of imprisonment and information on crime rates), before asking them to consider policy options to do with mandatory imprisonment and alternatives to prison as a way to ease prison overcrowding. Phase 3 involved a more intensive intervention again, and the results of that phase are the focus of this paper. Phase 4 was a six-month follow-up survey to assess whether any changes in attitudes towards the courts and sentencing achieved through the phase 2 and 3 interventions would be maintained in the longer-term (Mackenzie et al, 2012).

Phase 3 consisted of small group deliberative sessions to discuss crime and justice issues.<sup>3</sup> Participants were asked to consider two policy dilemmas: mandatory imprisonment, and the use of alternatives to imprisonment to address prison overcrowding (matching the two policy areas from the Phase 2 survey). Prior to the deliberative discussions, participants viewed informative DVDs using a professional broadcaster in a journalistic format that presented them with arguments on both sides of each policy dilemma. They were then asked to consider the arguments, discuss them within the group and work towards a consensus on the preferred policy option. Similar to a jury situation, participants were asked to discuss and deliberate and present their arguments for a position until a consensus was reached so that they might experience some sense of responsibility for their opinions. The two discussion issues were chosen as being salient to contemporary criminal justice policy.

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<sup>3</sup> The methodology is described in detail elsewhere (reference omitted for refereeing).



According to Price and Neijins (1998), three conditions are necessary for truly informed opinions to be achieved: the provision of relevant information; the ability to debate, discuss and deliberate; and participants experiencing a greater sense of responsibility for the decisions taken. Apart from providing relevant information needed to reach an informed decision, deliberative groups also require sufficient opportunity for discussion and reflection (during which they can test their views against those of others) and must change the focus from one of merely giving an opinion to one where a group decision is required. Placing respondents into a position akin to that of a jury – where they need to weigh up competing goals, arguments and constraints and where they are engaged as decision makers to arrive at a responsible decision – provides a task that invites a considered response (Fearon, 1998; Barabas, 2004).

Small group discussions make explicit some of the internal deliberations that participants use when considering a controversial issue and allows researchers to look for commonalities in deliberation. These internal deliberations are likely to be articulated as more than a simple transcript of the participants' introspections because they are uttering them in a social (and critical) environment. They are not simply reporting on their thoughts, but comparing, justifying and debating them. An analysis of what is said can point to those factors which influence attitudes. The group provided an audience for participants, formalised by the presence of a facilitator, to encourage a greater depth and variety of interaction and to elicit more open-ended responses.

The groups were designed to maximise interactions in order to:

- Try to make explicit the participants' attitudes, values, biases and 'framework of understanding' (Kitzinger, 2004) on each issue.
- Uncover any apparent collective norms that might exist.
- Discover the sorts of topics or statements that might elicit more or less discussion or consensus.
- Stimulate some level of conceptual conflict between participants to help clarify and 'unpack' the thinking that underlies their views.
- Look for factors that might lead people to claim that their views could be changed.

Participants' interactions thus form the major part of the research data for this phase of the project. In addition, by examining participants' direct quotations, the analysis is able to address one of the common criticisms of focus group studies: that the precise nature of the interactions between participants is not sufficiently reported (Kitzinger, 2004). A qualitative analysis of the discussions which took place provides an opportunity to uncover some focal concerns that underlie participants' opinions. The aim of the analysis is to uncover the sorts of concerns that are on people's minds when they talk about sentencing.

Four groups were held: two in Perth and one each in Brisbane and Melbourne, with a total of 39 people.<sup>4</sup> These discussions cannot be said to be representative (and were not intended as such), but the concerns raised and topics discussed can be seen as indicative of the sorts of factors that are relevant to people's opinions on sentencing.

NVIVO was used to classify, sort and analyse the data from the transcripts of the group discussions. This allowed a broad-brush coding using queries, based on 'nodes' (words or phrases) selected by the team to indicate those factors which might be of particular concern to the groups. We were interested in knowing whether particular points of deliberation (factors/nodes) tended to come up more frequently during discussions and if so, the extent to which these points were common to all the groups. NVIVO provided the means to do this by applying search queries and word frequency queries to each transcript.

### **Results: Analysis of overall discussions**

There were two separate topics in the group discussions, both of which required participants to try to reach consensus on the policy issues presented to them. In each session, the order of these two issues was randomised. The first issue revolved around mandatory sentences of imprisonment. Participants were first asked to consider some facts about mandatory sentences and arguments both for and against their use. Two arguments were presented in favour of mandatory sentencing: 'we have to make sure that the sentences handed out by the courts for particular crimes are consistent regardless of the circumstances of the case' and 'judges can't be trusted to hand down sentences that are tough enough'. Two arguments were then

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<sup>4</sup> The small number of participants was due to sampling constraints imposed by the sample size and research design for the full research project, combined with constraints on sample size caused by the (deliberate) number of regional and remote participants in the projects as a whole.

presented against mandatory sentencing: 'judges have to be able to consider important differences in cases and offenders when handing down sentences' and 'mandatory imprisonment leads to unjust sentences for less serious offenders'. Each argument was discussed in some detail, before the group was required to consider the following question:

When we talk about mandatory sentencing, we mean the process where *parliament* decides to limit judges' choices by fixing either the type of penalty for a certain crime or the minimum time that someone must be in prison. This set penalty must then apply regardless of the circumstances of the crime or the criminal and regardless of what the judge thinks a suitable penalty would be.

Knowing the main arguments for and against mandatory sentencing, and its alleged benefits and costs, we now need to think about this question – do we want to see mandatory sentences used more widely or not?

Next, the facilitator showed the video on alternatives to imprisonment, including issues of prison overcrowding. Again, participants were presented with arguments on both sides of the issue. Three arguments against the use of alternatives to imprisonment were presented: 'more prisons are needed to keep more offenders off the streets', 'alternatives to prison allow the offender to get off too lightly' and 'we need to use imprisonment to show society's disapproval of criminal behaviour'. Following these, three arguments were presented in favour of using alternatives to prison: 'we need to find alternatives to prison to reduce the high cost to the community of keeping people in prison', 'prisons should be used mainly for dangerous and violent offenders', and 'taxpayer money should be used on programs that reduce crime in the first place rather than on prison'. Each of the six arguments was discussed in some detail, before the group was required to consider the following:

I'd like to talk to you about some of the arguments that have been proposed about using alternatives to imprisonment as a response to prison overcrowding in Australia. In particular we're going to consider, and discuss, whether or not you think we should be trying to reduce the number of people who are being sent to prison in Australia by making more use of alternatives to prison.

So now that we have looked a bit more closely at the issues surrounding the greater use of imprisonment, do we want to continue this trend or should we be making more use of the alternatives?

Firstly, as a broad overview of the factors which commonly arose within these group deliberations, Table 1 shows the frequency with which particular 'nodes' arose in the transcripts of the focus group deliberations. These nodes are conceptual labels, created by the research team, under which to catalogue a range of spoken comments relating to common topics (factors) discussed by participants.

**Table 1 Frequency of factors arising in transcripts**

<b>Names (nodes)</b>	<b>Sources</b>	<b>References</b>
<b>Confidence in sentencing courts and judges</b>		
Scepticism about sentencing fairness	4	73
Trust in judges	4	67
Judicial discretion	4	33
Lawyer integrity and plea bargaining	4	27
Judicial independence	2	16
<b>Punitiveness (factors related to)</b>		
Each case is different – sentencing	4	67
Cost of putting people in prison (should be irrelevant)	4	47
Blaming the parents and society	4	42
Rehabilitation	4	37
Deterrence – a purpose for punishment	4	35
Just deserve	4	29
Violence	4	21
Corporal and capital punishment	3	15
Prisons keep people off the street	4	13
Victims	3	11
Child sex offences	3	12
Victims (sympathy for)	3	11
Hoons	2	9
Growing populations need more prisons	3	7
Morality – right and wrong	2	6
Early release from prison (too much)	3	6
Confusing rate with incidents	3	6
Stronger penalties reduce crime rates	1	1
<b>Social and demographic factors</b>		
Murder and homicide	4	60
Youth crime	4	54
Drugs and alcohol	4	47
Crime rate has fallen and or increased	3	11
Disrespect for law and consequences	4	9
Confusing rate with incidents	3	6
Comparing costs of prison to other public expenditure	3	6
Population density means more crime	2	5
Indigenous offenders	2	3
<b>Fear of crime</b>		
Crime prevention	4	35

Risks for police and ambulance officers	4	27
Violence	4	21
Public safety – community protection	4	17
<b>Scepticism and cynicism (about data)</b>		
Scepticism about how crime rates are measured and reported	4	27
Truth and sentencing	4	22
Scepticism and bias about the project	4	18
Disbelief in the background facts on DVD	3	15

The table lists all the nodes created for the purposes of coding the transcripts. Four of these five nodes represent one of five constructs measured in the first phase survey of the broader project, which had previously been empirically and/or theoretically linked to public perceptions of sentencing. In particular, measures of punitiveness and confidence in the courts have been used in previous research as the key drivers of public perceptions about sentencing. In the initial survey for the national research, therefore, punitiveness and confidence in sentencing were the two main dependent variables. Both fear of crime and social and demographic factors have been found in previous research to be related to perceptions of sentencing (although the findings have been somewhat inconsistent); measures of both were therefore included in phase 1 of the national survey. In turn, these four constructs were then drawn out from the deliberative group discussions. The fifth construct – scepticism and cynicism – arose organically and unexpectedly from the discussions, showing that some participants simply did not believe the facts that were presented. ‘Sources’ refers to the number of separate groups in which the topic arose. ‘References’ refers to the number of times the topic was mentioned across all four of the deliberative groups.

By linking the discussion group constructs to those found in both the larger national survey and in existing literature in the field, the deliberative groups provided an opportunity to ‘unpack’ the concerns underlying people’s opinions on mandatory sentences and alternatives to imprisonment in a way that has not previously been attempted. The opportunity for a new, more nuanced understanding of the concerns that underlie public opinion about sentencing represents a key contribution of this research to the field. As Table 1 shows, a relatively large range of factors were identified in relation to the topics for deliberation and an identifiable hierarchy, at least in terms of frequency, was apparent. Assigning each of these factors to one of the five constructs (where it was possible to meaningfully do so) enables us to unpack further the related opinions and attitudes. Next we suggest connections between

these general attitudinal positions and some underlying factors that seemed to generate or inform them, before a discussion of how these factors related more specifically to the two deliberative topics of 'mandatory sentencing' and 'alternatives to sentencing'.

#### Confidence in sentencing courts and judges

The two most common topics which arose, overall, in the deliberative sessions were 'scepticism about sentencing fairness' (73 mentions) and 'trust in judges' (67 mentions). Scepticism about the fairness of the system as a function of distrust in judges is illustrated by the following comments:

Now unfortunately that works very much against poorer people, so you have a system in place that's meant to be fair and everything, but if a person hasn't got any money or any links to argue their case then they're the ones that are going to be in prison not the people that perhaps should be in prison, but have got contacts.

I think we've seen that quite often the person who has got the best lawyer is going to have the best treatment.

These comments speak to one of the most fundamental concerns that has been posited to underlie low levels of trust in the criminal justice system: a lack of faith in the ability of judges to 'get it right' and impose sentences that are both fair and appropriate in the eyes of the community. When discussing policy options around mandatory sentencing and alternatives to imprisonment, one's confidence in judges and sentencing clearly plays an important role.

The perception that this perceived unfairness is systemic, rather than a problem with particular judges, resonated strongly throughout the discussions:

there's been so many extenuating circumstances that the sentences have just gotten lower and lower and lower and people just keep getting off because everything is considered a special circumstance.... there needs to be a pulling back of all those, you know special circumstances to a limited amount

The national survey conducted in the first phase of this project found that most respondents held little confidence in sentencing as they were dissatisfied with the appropriateness and effectiveness of punishments imposed by the courts (Mackenzie et al, 2012). They also expressed doubts as to whether judges are in touch with the

views of the general public. The frequency with which the 'scepticism about sentencing fairness' and 'trust in judges' nodes arose in the transcripts of the group deliberations suggests that any deficit in trust is linked more closely to perceptions that judges are out of touch, rather than to any obvious perceptions that they lack honesty or integrity.

#### Scepticism and cynicism about data

Scepticism and cynicism about the fairness of the sentencing process generally, and the proportionality of sentences handed down may reflect some wider scepticism about the veracity of 'published' facts about crime and sentencing *simpliciter*. The perceived unreliability of media reporting on crime was raised often:

we're all basing our judgement on what we read in the paper and we all know what we read in the paper is so skewed and so biased...

We were surprised to encounter a significant amount of participant cynicism, even about the accuracy of and the selection criteria for, the data presented to them on the DVD about such issues as trends in incarceration rates, low correlations between increased penalties and offending rates and the quantum of penalties typically imposed for particular offences. This was despite the identity and authority of the sources for these data being provided to the groups.

I've just got one thing to say, the facts are great, but I do think they were presented as against prison sentencing. That's what... that's what I came across to me.

They say [in the DVD] ... the total crime rate has fallen in Australia over the last ten years ...but the population's increased and now they're saying the crime rate's going down?

You're asking us to trust... you've actually looked at the research [about reductions in crime rate] ... what's available, up to date and so far there's been no evidence? Yeah right...

This may be consistent with previous research (Hough and Park, 2002) which suggests that the closer an individual's measured level of punitiveness is to the group mean, the more malleable it is likely to be in the face of intervention with some credible further data. But the further that level moves from the mean, the more unlikely that attitudes can be changed. If there is a correlation between distrust of data and low levels of confidence or higher levels of punitiveness, this may help to

explain why, for some people, no amount of discussion and deliberation will change their minds. For these people, measuring 'informed' opinion is likely to be impossible.

### Punitiveness

Although levels of punitiveness remain relatively high in Australia (Mackenzie et al, 2013), the discussions in these groups suggested that it would be wrong to assume that people are ignorant of some of the important dynamics which affect sentencing tariffs and the deliberations of sentencing judges. For example, participants acknowledged the need for the specific circumstances of offenders to be considered when sentencing. This complements existing research (Doob and Roberts, 1983; St Amand and Zamble, 2001) which suggests that when the information deficit, between what is known to the sentencing tribunal and what is known to the public is narrowed, there is the potential for a convergence of the sentencing preferences of both judges and lay persons.

'Each case is different – sentencing' garnered 67 mentions, indicating that participants acknowledged the individual and specific nature of cases that come before the courts. This acknowledgment would generally be one which speaks to a less punitive attitude. It is possible that there is some degree of tension between an appreciation for the complexities of individual cases – 'each case is different' – and a general lack of confidence in sentencing – 'scepticism about sentencing fairness'. Some acknowledgements of how circumstances can vary and thereby impact on criminal culpability seemed to depend on a participant's particular life experiences:

Each case I think is.. each circumstance is different .... You know people that don't take their medication and perhaps lash out or whatever I mean it happens in hospital every day....from elderly people well... you can't charge 'em. I've seen black and blue bruises on nurses.

This may reflect the real tension that exists for judges, who must balance the specific circumstances of the case before them with the law, the stated purposes of sentencing and current sentencing practices (Mackenzie, 2005).

### Social and demographic factors

Another commonly arising topic was 'murder and homicide' (60 mentions), indicating perhaps that people were thinking of the worst kinds of offences when they were discussing the two policy issues. This is not surprising, as research has shown that people typically think of the worst, most violent, repeat offenders when responding to



questions about sentencing (Gelb, 2006). In addition, 'youth' was mentioned 54 times, perhaps indicating that people acknowledged the differences between young and adult offenders, and the need for different criminal justice responses. Again, much research has shown that people are more accepting of rehabilitative and restorative approaches for young offenders than for adult offenders, preferring community penalties and skills training rather than imprisonment (Hough and Roberts, 2004). But again, we need to be cautious in assuming any particular levels of attitudinal homogeneity among surveyed groups. Some participants appeared cynical about the effect of affording young people the sorts of legal rights which are mandated by both domestic and international law:

Well every kid these days knows their rights and they can go and do what they like.. I think there's an article in the paper not long ago about an 11 year old kid who just laughed at the police and said "well you can't touch me".

By way of contrast, others advocated for a juvenile justice system which is even more sensitive to the damage which institutionalisation and incarceration can have on the life chances of younger people:

we really need to go back and start looking at the juvenile justice system and looking at what can be done there for people because I think you've got people who... don't know whether they're all salvageable, but I think certainly they're more likely to be salvageable at, at 15 then, than 25 you know.

This differentiation is supported by Australian research that shows that people prefer rehabilitative sentencing for young offenders and more punishment-focused sentencing for adults (Spiranovic et al, 2012).

### Fear of crime

Although prior research suggests that citizens generally overestimate their chances of being a victim of violent crime, but underestimate the severity of sentences handed down for these offences (Roberts and Indermaur, 2009), 'fear of crime' on a personal did not seem to emerge as a significant focus of deliberations within any of the groups. What comments there were in relation to this factor seemed more focussed on risks to police and ambulance workers. So attitudes emerging in the groups were likely not being driven by fear of crime.

### **Analysis of discussions on mandatory sentencing**

In order to understand more closely the values and beliefs underlying these broad constructs, it is useful to examine some specific comments made by group participants in response to each of the two policy areas.

The overall analysis indicates that trust in judges and fairness in sentencing were common topics of discussion, but the detailed comments show that participants were concerned that any move to curtail judicial discretion would *reduce* fairness in sentencing, by removing the judge's ability to take into account the specific circumstances of each case. The comments therefore related closely to the concept of individual differences among cases:

Not being able to take into account the specific circumstances of a case is totally against natural justice.

The problem is that you're taking away the discretionary power from a judge to consider the particular facts and circumstances in a particular case.

It's actual justice, if we disregard the circumstances of an individual in a particular circumstance you might as well chuck the whole bloody system out the window.

Participants recognised that mandatory sentencing was often a way to deal with a lack of trust in judges to impose appropriate sentences, although they were also aware that mandatory sentencing policies are a politically simplistic way to prove 'tough-on-crime' credentials:

Mandatory sentencing is a no-confidence vote against judges in the judiciary and it shouldn't be.

Mandatory sentencing comes in as a political ploy, basically...

Say mandatory, "we're tough on crimes".

Well something that every party is likely to ... pander to people's prejudices and fears in an election campaign to help them get elected and so, they so "oh well, tough on crime...".

I get the feeling that it's a political solution, because it's the actual parliamentarians who are deciding how severe the sentence will be and therefore and they're reacting because of public concern about various crimes in the community. And I don't think it's a really good basis on which to decide how severe sentences should be.

Are they reacting to a majority of public opinion or are they reacting to a minority squeaky wheel, that's something I sort of often wonder and am concerned about. You find people sort of get very theatrical...

Comments around mandatory sentencing were founded on concerns about fairness in sentencing where judicial discretion to be reduced. They recognised that each case coming before the courts is different and requires the judge to consider the individual circumstances of the offence, the offender and the victim. This seemed to be the key focus of this part of the groups' discussions.

An ancillary focus was the issue of independence, with recognition that allowing Parliament to mandate sentences might be more in the interest of political gain than achieving justice. But when pressed to reach a consensus on the use of mandatory sentencing as a policy, participants found it very difficult to agree. Of the four groups, one reached consensus in favour of mandatory sentencing, one reached consensus against mandatory sentencing, one agreed that prescribed minimum terms would be preferable to mandatory terms, and one could not reach consensus at all. This illustrates the complexities of achieving a single policy stance in an area as fraught as this, and perhaps does not bode well for policy-makers hoping to measure 'true' public judgment on this issue.

### **Analysis of discussions on alternatives to imprisonment**

The overall analysis of the discussion on alternatives to imprisonment showed that people tended to focus on two types of offenders: extremely violent offenders such as murderers, and young offenders. Two main concerns seemed to underlie the discussions: about tailoring alternatives to specific kinds of offenders, and about the effect of imprisonment on the offender and the community.

Alternatives to imprisonment were seen as appropriate only for some kinds of offenders. While participants agreed that violent offenders needed to be imprisoned, they were particularly open to the use of alternatives for young offenders:

I think certainly they're more likely to be salvageable at, at 15 then, than 25 you know.

I actually think in terms of money it's really quite irrelevant in terms of the strategy. I think it's the outcome that we're going to get from the investment, cause I actually think, if there's an option say to stop the 18 year old, 21 year old kids, you'd invest it, double that amount of money for one year, but it has a real outcome for that kid's future life, that's more beneficial than them spending five years in prison, so I think in terms of money really, isn't the issue as what the outcome is for society, and for that person in the long [term]you know.

More use of alternatives, particular with the younger under 25's.

Not everybody should be in prison, in fact unless you're a danger to society you shouldn't be in prison.

That should only be dangerous and violent offenders should really be in there.

Yeah, well it's got to be alternatives, everybody wants alternatives, but it's just to find the right alternative to fit the crime.

Yeah, but just saying alternatives is great, 'cause then you can have a whole variety... yes, but most definitely prison's got to be in there, because there's always people who will not, who will be too bad they can't be in the community; they've got to go somewhere.

There was also general acknowledgement of the negative impact that imprisonment may have on offenders, including the effect on their families and communities:

We're not doing the society any favours, because...then they learn in prison and they come out worse than they went in.

And also they lose their job, or whatever then they come out, then they have to escalate their crime level etc. You know the risk is you're punishing the family and kids...

But there should be something in between the fines and community service that's not actually in prison with hardened criminals, 'cause that's where they end up.

Because the high cost off of the community would come in in the person who's going to prison for the lesser crime if he's the breadwinner, so they have to keep the family; they have to give them welfare and things like that, so that's more money being added on to it, so if it's a lesser crime...give an alternative sentence for that; it would be much better.

It would be better off putting him in an ankle bracelet and making him go to work to support his family, keep him on the straight and narrow and we've saved a 100 grand and there's less other ongoing social problems into the community.

Contributing to the community.... If they contribute to the community and actually do something that is constructive rather than being locked away which is to me seems for some crimes counter-productive, it costs us a fortune. They get most probably taught the wrong things anyway, they don't get rehabilitated, and you end up with a bigger problem then you started off with, so it makes you wonder exactly what prisons achieve.

Ultimately, the groups were more successful in reaching consensus on this issue than on the issue of mandatory sentencing. Participants were interested in rehabilitation and crime prevention, especially for young offenders, with prison being reserved for the more serious, violent offenders.

At the same time though participants noted that alternatives to prison needed to be effective and serious, rather than a 'slap on the wrist':

I think what you're trying to say is that we actually want something that is tangible, a tangible alternative to prison that has got some rehabilitation effect and also too that it has got an effect of providing some sort of not just penalty, but it has a rehabilitation program associated with it that is monitored and actually is effective. And so you actually have like a feedback loop on it, so you have a program assigned, monitored progress, and see how it turns out, and if it doesn't turn out well then you go to plan B and you do have to have this feedback loop of what happens; outcome, consequences and all the rest of it - it has to work.

### **The value of group discussions for participants**

Finally, it is useful to consider some of the participants' own comments about the value of the discussions in helping them to deliberate on the issues and come to more informed judgments.

Participants' comments revealed the power of the group deliberations to help them to reflect on their own knowledge, understanding and beliefs:

I'm leaving more informed, I'll say that, not necessarily a new opinion.

Well I've certainly got food for thought, perhaps ... I might well and truly look at my opinions I think.

I sort of swayed a bit, because I feel like I think we should have mandatory sentencing, but I think we also should have alternatives to prison for lesser crimes, so I sort of originally was thinking, "yeah we should just have mandatory sentencing and lock them all up, who cares" you know, so you know when you just think about it in black and white like that you think, "well who really cares about them". But then when you start talking about it I think, "well if doing alternatives is going to help the community overall at the end of the day, then isn't that the point".

It does actually make you think on, think things through, 'cause my son asked me, so mum what do reckon about the laws? I couldn't really have any answer, but as I was reading through and listening to the DVD and that, you sort of think things through differently and... it might be a bit more clearer [than] what you think.

No, but it's like [...] was saying , you know, people say things and then you reflect back on how you thought it through to start with, and then it sort of changes your wording, and then you talk yourself around in a circle.

Participants also reflected on the role of the media in influencing people's opinions, and noted the distorted view that is presented to the public on crime and justice issues:

I did have a change of opinion, but one thing influences a lot with this, is what's displayed in the media, because ... you know we only hear bad cases in the media and so there's lots of good stuff that happens, but you don't really hear about that unless you want to go and sit in on the court.

It makes you think well actually what we know is only all the bad things and the stuff that gets publicised when that's been sensationalised

But if you go to a jury duty I think you see these things that go on in the sentencing and the whole complete thing, not what's written in the paper and it's completely... what they write about in the paper's completely different from what goes on in court. Maybe the end the result's the same, but the junk in between is completely different.

And this is the problem, the public is not given the full information that people attending court are, and that's why we have an attitude; "that's not stiff enough, these people deserve more".

That's what needs to happen in the community - we need to be more aware of how the judiciary make decisions about sentencing and so on, so that we're confident about, we have a really good understanding about what is happening in the courts. And not just what the media tells us, which I think is often very, very biased.

## **Conclusion**

Views and attitudes about sentencing can be emotive and complex. While political polling and policy development tends to rely on top-of-the-head responses to simple survey questions, it is clear that more nuanced and thoughtful responses can be facilitated via small group discussions and deliberations.

Under such circumstances, the typical top-of-the-head punitiveness seen in abstract polls gives way to a far more reasoned and less punitive approach to crime. This is of particular import in the current political environment within some Australian jurisdictions, such as Victoria and Queensland, in which governments are justifying major punitive reforms by reference to 'what the public wants' (Trotter and Hobbs, 2014). This research makes clear that informed public opinion is neither as punitive nor as homogenous as politicians tend to assume.

A lack of trust in judges provides a ripe environment for punitive, populist law-and-order political rhetoric. Tough and conservative laws and sentencing policies are more likely to germinate in the fertile soil of a punitive public, and law-and-order politicians are quick to take advantage of people's fear of crime. At the same time, such an environment makes reform more difficult when it is perceived as being 'soft' on crime.

The research methodology itself has shown that people think in rich and diverse ways when afforded the chance to reflect on their opinions in a structured group environment. The content of the discussions has shown that the main concern for participants around both mandatory sentencing and the use of alternatives to imprisonment seems to lie in the concept of tailoring the sentence to fit the specific circumstances of each case. By giving people relevant information, an opportunity to

discuss the issues and by placing them in a position of responsibility for their decisions, this research has shown how small group deliberations can facilitate genuine reflection and thought on especially complex issues.

By analysing the foci of these small group discussions, it is hoped that this paper will assist policy-makers in gaining a deeper insight into some of the underlying concerns that may influence people's opinions on crime and justice issues, and in seeing that there is far more than meets the eye to 'what the public wants'.

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